

³ Appellant timely requested an oral argument before the Board pursuant to section 501.5(b) of the Board's *Rules of Procedure*, 20 C.F.R. § 501.5(b). After exercising its discretion, by order dated July 27, 2017, the Board denied the request for oral argument as the issue on appeal could be fully addressed on the record. *Order Denying Request for Oral Argument*, Docket No. 17-0962 (issued July 27, 2017).

ISSUE

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

On appeal appellant, through her representative, argued that OWCP erroneously failed to provide a merit review based on the new opinion of appellant's physician. He alleged that appellant submitted new evidence and argument, that her physician explained the mechanism of the injury, and that OWCP was improperly playing doctor. Appellant's representative also contended that OWCP only seemed to accept the magnetic resonance imaging (MRI) scan findings and ignored other objective medical findings.

FACTUAL HISTORY

On October 31, 2014 appellant, then a 48-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging that on October 14, 2014, she stepped in a hole and jarred her back while delivering mail. She did not report that she had stopped work. The employing establishment controverted the claim.

In support of her claim, appellant submitted medical evidence, including reports from her treating Board-certified orthopedic surgeon, Dr. Michael A. Seivert.

By decision dated January 12, 2015, OWCP accepted that the employment incident occurred as alleged, but denied appellant's claim because she had not submitted evidence of a medical diagnosis in connection with the employment incident. Thus appellant failed to establish an injury as defined by FECA.

On February 10, 2015 appellant requested review of the written record by an OWCP hearing representative.

In a January 28, 2015 MRI scan report, Dr. Anita Rich, a Board-certified radiologist, diagnosed mild multilevel spondylitic change in the lumbar spine, without evidence of nerve root impingement. She also found that at L4-L5, there was a mild broad-based disc bulge which showed a subtle right foraminal to extra foraminal protrusion, as well as mild-to-moderate facet and ligamentum flavum hypertrophy. Dr. Rich noted that these factors caused mild bilateral neural foraminal narrowing, right greater than left.

In a February 4, 2015 note, Dr. Seivert stated that on October 14, 2014 appellant stepped in a hole while delivering mail for the employing establishment. He indicated that when appellant stepped into the hole, her right leg was jammed into her right hip, causing her lumbar spine to pop, leading to broad-based disc bulges at L2-L3, L3-L4, and L4-L5 and a subtle right foraminal to extra foraminal protrusion, as well as mild-to-moderate facet and ligament flavum hypertrophy at L4-L5. Dr. Seivert stated that because of this on-the-job injury, appellant now had a condition involving multiple level disc bulges, which caused mid-back and low-back pain. He noted that an MRI scan on January 28, 2015 proved appellant's condition.

On July 20, 2015 the hearing representative affirmed the January 12, 2015 decision with modification. She found that appellant had established a medical diagnosis, but failed to

establish that her diagnosed medical condition was causally related to the accepted employment incident. The hearing representative noted that, although Dr. Seivert opined that appellant's disc bulges were the result of her work incident and caused her back pain, he attributed the condition to the claimant's jamming her right leg into the hole when she delivered mail. However, she noted that the MRI scan indicated that the changes were mild multilevel spondylitic changes without evidence of nerve root impingement or disc herniation. Accordingly, the hearing representative found that Dr. Seivert's February 4, 2015 report was insufficiently rationalized to establish a finding of causal relationship.

On July 18, 2016 appellant, through her representative, requested reconsideration. In support thereof, appellant submitted a January 14, 2016 report wherein Dr. Seivert diagnosed "[t]horacic, lumbosacral, and sacroiliac and pelvic and hip somatic dysfunction and pain." Dr. Seivert reiterated that appellant jammed her leg into her socket and it threw off her pelvis, which created problems with her thoracic, lumbar, sacroiliac, and pelvic areas. He opined that this incident occurred on the job. Dr. Seivert explained the biomechanical process as that she stepped into a hole and landed hard, which jammed her hip up into the socket. This caused a shift in the pelvis which, in turn, caused an injury to the sacroiliac joints, the pubic symphysis, the lumbar spine, and then up the thoracic spine.

By decision dated October 6, 2016, OWCP denied appellant's request for reconsideration. It noted that Dr. Seivert's report was cumulative and substantially similar to evidence already of record. OWCP noted that Dr. Seivert's report still did not make it clear whether the accepted employment incident resulted in the mild multilevel spondylitic changes without evidence of nerve root impingement or disc herniation as shown on the MRI scan.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,⁴ OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁵ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁶

ANALYSIS

On January 12, 2015 OWCP denied appellant's claim as she failed to establish a causal relationship between the accepted employment incident and her diagnosed medical condition. This decision was affirmed, as modified, by the hearing representative on July 20, 2015.

⁴ 5 U.S.C. § 8128(a).

⁵ 20 C.F.R. § 10.606(b)(3).

⁶ *Id.* at § 10.608(b).

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

OWCP reviewed appellant's request for reconsideration under the appropriate criteria for timely filed reconsideration petitions. In her request for reconsideration appellant did not show that OWCP erroneously applied or interpreted a specific point of law, nor did she advance a relevant legal argument not previously considered by OWCP.⁷

Appellant also did not submit relevant and pertinent new evidence not previously considered by OWCP. The underlying issue in this case is whether appellant established that she sustained an injury causally related to her accepted employment incident. On reconsideration, appellant submitted a new report, dated January 14, 2016, by Dr. Seivert. In this report, Dr. Seivert indicated that appellant stepped into the hole on October 14, 2014, which jammed her hip up into her socket. This caused a shift in the pelvis, which in turn caused injury to the sacroiliac joints, the pubic symphysis, the lumbar spine, and then up the thoracic spine. This report, however, contains language that is substantially the same as that found in Dr. Seivert's earlier reports, most notably his February 4, 2015 report. OWCP had previously determined that Dr. Seivert's reports were not well rationalized when considered in conjunction with the MRI scan report which indicated that the changes evidenced were mild multilevel spondylitic changes without evidence of nerve root impingement or disc herniation. Evidence which is duplicative, cumulative, or repetitive in nature is insufficient to warrant reopening a claim for merit review.⁸

Accordingly, as appellant has not met any of the criteria warranting reopening her claim for further merit review, pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim under 5 U.S.C. § 8128(a).

⁷ See *J.F.*, Docket No. 16-1233 (issued November 23, 2016).

⁸ *Denis M. Dupor*, 51 ECAB 482 (2000).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated October 6, 2016 is affirmed.

Issued: September 8, 2017
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board